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In the

Supreme Court of the United States

October Term, 1984

ECOS ELECTRONICS CORPORATION,

Petitioner,

vs.

UNDERWRITERS LABORATORIES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Seventh Circuit's conclusion that fraudulant and deceptive standards cannot, as a matter of law, form a part of a conspiracy to restrain trade in violation of the antitrust laws because such standards allegedly are merely opinions which eliminate market imperfections contradict this Court's decisions in Radiant Burners v. Peoples Gas Light and Coke Company, 364 U.S. 656 (1961) and American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982)?

2. Did the Seventh Circuit erroneously distinguish Radiant Burners v. Peoples Gas Light and Coke Company, 364 U.S. 656 (1961) and American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982) on the ground that the standards organizations improperly denied needed seals of approval to plaintiffs in those cases, whereas in the instant case the standards organization fraudulently embedded products of inferior quality into the marketplace, although the effect in all cases was plaintiff's exclusion from competition in the relevant

market?

3. Did the Seventh Circuit's conclusion that standards, despite their restrictive impact, are as a matter of law innocent expressions of opinion, improperly limit the prohibition of the Sherman Act to restraints which limit competition only as to the price of products in the relevant market, thus immunizing restraints which limit competition as to the quality of products in the relevant market?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 743 F.2d 498 (7th Cir. 1984). The opinion is also reproduced in the Appendix at A-1 to A-10*. The Opinion, Judgment, and Amendment to Judgment of the District Court are unreported and are reproduced in the Appendix at A-11 to A-17.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1984. No rehearing nor extensions were requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves application of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1and 2. This statute provides:

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* Citations to the Appendix to this petition are in the above form.

§ 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

A. Summary Of ECOS' Position

Petitioner ECOS Electronics Corporation (plaintiff)* alleged that it has been effectively precluded from the market for outlet circuit testers as a result of a conspiracy between certain of its competitors, certain standards organizations, and certain users of outlet

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* ECOS Electronics Corporation has no parents, subsidiaries, nor affiliates.

circuit testers.* The aim of this conspiracy was and is to eliminate all competition as to quality in the circuit tester market through the use of false and deceptive standards, product evaluations, and technical studies in violation of the Sherman Act, 15 U.S.C. §§1 and 2. The District Court's jurisdiction was based upon 28 U.S.C. §1337 and 15 U.S.C. §§15 and 26.

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* The named defendants in the District Court were Daniel Woodhead Company ("Woodhead", (ECOS' competitor)), National Fire Protection Association ("NFPA"), Underwriters Laboratories ("UL"), American National Standards Institute ("ANSI"), National Safety Council ("NSC") (standard making organizations), Monsanto Company (user of circuit testers) and two individuals: Alan Reed (an officer of Woodhead and an active member of key NFPA and NSC committees) and Robert West (an employee of Monsanto and an active member of key NFPA committees). All defendants answered except UL. The District Court granted UL's motion to dismiss [see p. 5, n. * below] and entered judgment pursuant to F.R.C.P. 54(b). This appeal followed while the case proceeds as to all other defendants in the District Court.

In affirming the District Court's dismissal of plaintiff's complaint*, the Court of Appeals effectively immunized all standards-making and product certifying activity from scrutiny under the antitrust laws. Despite plaintiff's unchallenged detailed allegations to the contrary, the panel held that the standard and product certification at issue herein did not unreasonably restrain trade. Rather, the panel characterized such standards as mere expressions of opinion concerning the quality of certain products. These "opinions", according to the panel, as a matter of law, cannot unlawfully restrain competition: manufacturers which disagree with these opinions need simply advertise their own opinion and may compete freely in the marketplace.

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* While the District Court purported to enter summary judgment against ECOS, as the Court of Appeals recognized, none of the affidavits, depositions, or exhibits of record were relied upon by either the District Court or by the Court of Appeals. Thus, the decisions of the lower courts should be treated as dismissals on the pleadings. As an aid to this Court, plaintiffs' complaint is reproduced in the Appendix, pp. A-18 to A-65 and the Amendment Number Two to Complaint is reproduced at A-66 to A-90.

Plaintiff respectfully submits that the panel's characterization of standards as "opinions" which do not, as a matter of law, unlawfully restrain trade is unique in the history of antitrust jurisprudence. In particular, the panel's holding simply cannot be reconciled with this Court's holding in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982).

B. Statement Of The Facts

ECOS Electronics Corporation

The product involved in this case is generically known as an "outlet circuit tester" (sometimes described as a "circuit tester" or "tester") (A-70, ¶ 45(a)). An outlet circuit tester is intended to determine if 120 volt electrical systems and outlets possess effective grounding paths (as is further described in the complaint, A-39, ¶¶33-38) and are otherwise free from particular hazards (A-70, ¶45(a)).

Plaintiff has continuously manufactured and distributed a line of outlet circuit testers since 1971 (A-72, ¶45(b)).

During the late 1960's and early 1970's, Daniel Woodhead Company* ("Woodhead") also developed an outlet circuit tester. Subsequently, other manufacturers produced a tester functionally identical to the Woodhead tester (these testers are sometimes collectively described as "Woodhead-type testers"). The Woodhead-type tester are inadequate and inferior devices which do not perform the functions manufacturers attribute to them; that is, determine whether 120 volt electical systems and outlets possess effective grounding paths and are otherwise free from particular hazards. The Woodhead-type testers fail to indicate the existence of certain conditions in an electrical system which constitute electrical hazards and often do not indicate defects which the manufacturers claim they will indicate (A-72, ¶ 45(c)).

Plaintiff's circuit testers do not possess any of the defects and inadequacies of the Woodhead-type testers. On the contrary, plaintiff's circuit testers

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* Woodhead, a defendant below, is not a party to the instant appeal.

accurately indicate whether the grounding path of a 120 volt electric circuit is continuous, has a sufficiently low impedence (as is further described in the complaint, A-44, ¶44) and is otherwise safe. Plaintiff's testers in part perform these tests by injecting a test pulse of electricity into the grounding path and by measuring the impedence of this path. In sum, the plaintiff's testers are functionally superior and technically more advanced than the Woodhead-type testers, are more expensive to manufacture and, as a consequence, have a higher purchase price than the competing Woodhead-type testers (A-72, ¶45(c)).

Underwriters Laboratories, Inc.

Respondent (defendant below) Underwriters Laboratories, Inc. ("UL"), with its principal offices in Northbrook, Illinois, engages in a wide variety of activities, including the UL testing and Listing of products and the development and promulgation of UL Standards for Safety (A-66, ¶17).

UL Standards for Safety evolve from product listings as follows: in return for the payment of a monetary fee to UL, an applicant may submit its pro-

duct to UL for investigation in order to obtain a UL Listing and the right of the manufacturer to affix the UL Listing mark to its products and promote the mark in advertisements.

UL tests the products against requirements previously developed for similar products or, if no similar products have been tested, UL develops new requirements based on the features and design of the submitted product. If the product meets UL's requirements, then UL permits the manufacturer, upon payment of additional fees, to affix the UL label to its product (A-67, ¶18).

After UL has Listed a number of products in a particular category, such as outlet circuit testers and other similar devices, UL promulgates these functional and design criteria for the Listing of these products in the form of a printed document called a "UL Standard for Safety" which is "almost universally accepted in the marketplace as the definition of an adequate or safe level of performance for the particular type of product described in the Standard" (A-68, ¶19).

Impact Of UL's Listing And Standard On The Circuit Tester Market

UL, because of its "long history of involvement with safety standards and product testing * * * and because of its aggressive marketing activities," can effect an enormous positive impact upon the sales of a product which receives a UL Listing or which UL declares complies with its applicable Standards For Safety (A-69, ¶20).

The reasons for UL's capacity to impact a particular market stand unchallenged in the record:

When most private companies or municipalities review the marketplace for a particular type of product, they do not have the capacity (either technical or financial) to test competing products for performance capabilities. As a consequence, in those instances where UL has evaluated a particular type of product through its Listing and/or Standards For Safety, would-be purchasers rely upon UL's determination that a product meets those performance levels which UL believes are acceptable and appropriate.

Moreover, if two competing products bear the UL "seal of approval", purchasers will generally select the less expensive product, again for reasons which are manifest:

Since, it is apparent to the would-be purchaser that UL has determined that the less expensive product "will do the job", why spend more for a product that claims greater effectiveness due to superior but more expensive technology? UL has already determined that the less expensive product does all that is needed to be done; one can only conclude that the more costly product simply contains "frivolous, unnecessary and unduly expensive features" (A-69, ¶21; A-86, ¶58(p)).

The broad impact of UL Standards is increased by UL's policy of submission of its Standards to the American National Standards Institute (ANSI)* for approval as American National Standards. When a UL Standard is approved by ANSI, its market impact is greatly increased. Many large corporations, government units

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* ANSI, a defendant below, is not a party to the instant appeal.

from the local to the national level, as well as many foreign corporations and governments look to an ANSI Standard in determining what product to purchase. In addition, ANSI Standards are routinely referenced in corporate purchase guides, incorporated into local building codes, and are adopted by engineers, architects and others responsible for the design and construction of products or systems, as well as by OSHA and other federal agencies (A-29, ¶ 13 and 14).

When standards are set and products are certified in a fair, unbiased manner, this system produces a more efficient market. The standards organizations perform a service to the public by informing potential purchasers of the level of safety they reasonably need and by indicating which products provide the necessary level of protection. The manufacturers are then free to compete as to price. However, when the standards and product certification are fraudulently set as a result of a conspiracy between a standards organization and a particular group of manufacturers, the result is profoundly anticompetitive: potential consumers are provided incorrect, misleading and dangerous informa-

tion. Excluded manufacturers — those that manufacture either more or less sophisticated products — are improperly and unreasonably, but very effectively, excluded from the market with no coutnerbalancing increased market efficiency (A-69, ¶21).

The Conspiracy To Eliminate Competition In the Outlet Circuit Tester Market

The market for outlet circuit testers has historically been dominated by the inferior Woodhead-type tester. This dominance has been inappropriately achieved through the fraudulent UL Listing mark affixed to the Woodhead testers in 1972 and to other Woodhead-type testers shortly thereafter, and through the subsequent promulgation of the UL Standard for Safety 1436 which UL issued after UL, Woodhead and other manufacturers of Woodhead-type testers agreed that the Woodhead-type testers would continue to be Listed in spite of their limited performance (A-70, ¶ 45(a)).

Plaintiff's complaint, as amended, carefully sets out the details of this conspiracy in restraint of trade: in particular, that UL, ANSI and Woodhead as well as

other outlet circuit tester manufacturers agreed, combined and conspired to manipulate UL's Listing and standard development procedure to insulate the manufacturers of the Woodhead-type testers from competition with manufacturers of superior testers such as plaintiff. The conspiracy included the use, among other mechanisms, of UL Listings which were knowingly based upon inadequate, arbitrary, capricious and deceptive criteria, sales documents and related materials; and thereafter, through the use of arbitrary, capricious, deceptive and exclusionary UL and ANSI Standards, sales and technical documentation, and related material (A-74, ¶ 56).

The complaint further states (A-75, ¶56) that the intent, tendency and inherent nature of this conspiracy was and is to:

(a) place in the market and to sell inferior outlet circuit testers in interstate commerce;

(b) deceive purchasers into buying products they would not otherwise buy at the expense of competing products;

(c) obtain a competitive advantage in the market over other manufacturers and distributors like plaintiff;

(d) exclude, inhibit and restrict from entry into or participation in the market, technically superior outlet circuit testers;

(e) unreasonably restrain and inhibit the development, manufacture and sale of technically superior outlet circuit testers; and

(f) standardize products as well as standardize prices.

Plaintiff then alleges specific conduct which forms the basis and implementation of this conspiracy:

UL's Wrongful Listing Of The Woodhead-Type Circuit Tester

Sometime prior to November 22, 1972, Woodhead requested that UL List the Woodhead Model 1750 Receptacle Circuit Tester, pursuant to the UL procedure previously described (A-76, ¶ 57). Several years before, UL had refused to List a virtually identical Woodhead tester because UL's tests showed that the tester was not accurate in that it indicated that potentially dangerous circuits were safe when in fact they were not (A-91 to A-96).

Notwithstanding, on November 22, 1972, UL entered into an agreement with Woodhead, whereby UL allowed the UL Listing mark to appear on the Woodhead tester. UL entered into this agreement without determining whether the tester accurately identified dangerous circuits (A-76, ¶ 57).

On or about January 31, 1973, UL's Chicago laboratory was advised by its Melville, Long Island, New York laboratory that the Woodhead tester in fact was faulty, hazardous and misleading to the user and questioned whether UL should permit the Woodhead tester to retain its UL Listing (A-77, ¶ 58).*

However, UL did not withdraw the UL Listing for the Woodhead-type tester nor did it require Woodhead or other manufacturers of Woodhead-type testers to

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* The UL Melville Laboratory concluded that "The nature of the shortcomings are such that a consumer can be lead to believe that a receptacle that he just tested is OK for use, or has a relatively minor fault which is not particularly hazardous, when actually the receptacle is faulty in one of quite a large selection of hazardous ways involving a connection between the GROUNDING contacts on the receptacle and the UNGROUNDED conductor " (A-110).

correct or upgrade the testers. Rather, on or about April 30, 1973, UL, Woodhead and Harvey Hubbell, Inc. (another manufacturer of a UL Listed Woodhead-type tester) agreed that Woodhead and Hubbell could retain their UL Listing provided that Woodhead and Hubbell would place in the packages for their respective testers certain written disclaimers which purported to advise users of the faulty and hazardous nature of the Woodhead-type tester (A-77, ¶ 58(a)).

These written materials were and are inadquate and deceptive since they do not disclose to the user the inadequate tests which UL performed on the Woodhead-type circuit testers, the findings of UL's Melville laboratory, and the otherwise ineffective nature of this type of tester. Moreover, the printed materials that UL, Woodhead, and Hubbell agreed upon are commonly printed and packaged in such a way that they are not likely to be read by the purchaser prior to sale and will be discarded immediately after sale, thus ensuring that very few users will ever see them. However, the purchaser is immediately and continuously made aware of UL's approval of these testers through the highly visible

UL Label which is highlighted on the container in which the tester is sold, on the product itself, and in the manufacturer's advertising materials (A-78, ¶ 58(b)).

The Development And Promulgation Of UL 1436

Between 1973 and 1977, UL continued to List the Woodhead-type testers manufactured by Woodhead and Hubbell and approved similar Listings for a number of equally deficient Woodhead-type testers manufactured by other companies. At no time did UL require manufacturers of the Woodhead-type testers to improve their testers or withdraw UL Listings from this type of testers (A-78, ¶ 58(c)). In 1977, UL formalized these inadequate requirements as a UL Standard for Safety: UL 1436. In March, 1981 UL announced that all previously UL Listed Woodhead-type outlet circuit testers complied with UL 1436 and further permitted these manufacturers to advertise that their products complied with UL 1436, although UL had not required these manufacturers to change the faulty Woodhead-type testers in any way.

In its complaint as amended, plaintiff charged that UL 1436 and the way UL permitted manufacturers of

Woodhead-type testers to use UL 1436 represented unreasonable and deceptive practices. In particular, plaintiff charged (A-79, ¶58(f)):

(a) UL wrongfully represents to the public that UL 1436 is "consonant with social and technological advances" when in fact, it is not. UL 1436 was designed to meet the technical and functional limitations and inadequacies of previously UL Listed outlet circuit testers

(b) UL 1436 purports to require outlet circuit testers to "accurately indicate *** open ground" and specified wiring errors; in fact, UL took no steps to require upgrading of the Listed testers to an adequate and safe performance level once it was aware that its Listed testers were inadequate and that properly functioning testers exited in the marketplace;

(c) UL failed to perform any independent studies, tests or investigations to determine the applicable "state of the art" for outlet circuit testers;

(d) UL failed to disclose to the public that it had not performed any independent studies, tests or investigations to determine the applicable "state of the art" for outlet circuit testers;

(e) UL failed to disclose that it had accepted fees from the manufacturers of Listed testers who participated in the development of UL 1436; and

(f) UL did not disclose that UL 1436 does not comply with the National Electrical Code in that it did not require testing for an

effective grounding path, nor for a neutral-ground short, although UL states that all of its Standards seek to comply with the National Electrical Code.

Woodhead and other manufacturers of Woodhead-type testers now advertise in the relevant market that these testers are UL Listed (A-81, ¶58(g)). The consumer is wrongfully led to believe that an adequate or safe level of performance for the product has been achieved through UL's criteria (A-86, ¶58(p)) universally known as UL Standard For Safety (A-68, ¶ 19).

ANSI Adoption Of UL 1436

Pursuant to the subject conspiracy, on or about May 25, 1979, UL submitted UL 1436 to ANSI for approval as an American National Standard in order to increase UL 1436's impact on the world market (A-84, ¶ 58(l)).

From May, 1979 to Februrary, 1981, both UL and ANSI recieved comments from various sources, includ-

ing plaintiff, which opposed ANSI's adoption of UL 1436 for many reasons (A-84, ¶ 58(m)).*

As a result of these objections and communications, ANSI received full knowledge that UL 1436 was arbitrary and exclusionary in nature and that UL had Listed to that standard Woodhead-type testers which were technically inadequate; yet, in violation of its own rules ANSI, on July 16, 1981, approved and adopted UL 1436 as an American National Standard: "ANSI/UL 1436". ANSI thus became a participant in the subject conspiracy (A-84-85; ¶¶ 58(l),(m), and (o)).

Woodhead and other competitors of plaintiff have capitalized upon ANSI's adoption of UL 1436 as an ANSI Standard in the marketing of their products (A-85, ¶ 58(o)).

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* Plaintiff had made the same objections to UL when it considered adoption of UL 1436 (A-84, ¶ 58(l)). Rather than modifying or upgrading its standard as its own procedures required, UL instead chose to wrongfully attack plaintiff. For example, UL stated in a February 3, 1981 letter that plaintiff's tester was hazardous because of the amount of current it injected into the electrical system, a contention that had no basis in fact (A-97-99).

Restraint Of Competition

In essence, plaintiff has alleged (and stands ready to prove) that UL, Woodhead and other manufacturers of Woodhead-type testers have conspired to embed an inferior product into the outlet circuit tester market, a conspiracy which has had a profound impact on interstate competition by manufacturers of circuit testers of varying quality and performance capabilities and ultimately, upon consumers' ability to purchase high quality testers at a lower price. Plaintiff further charged that (A-86, ¶ 58(p)):

> UL Listed Woodhead-type testers have been, and will continue to be, given an unfair competitive advantage over the more superior and technically advanced testers like those manufactured by plaintiff; potential purchasers will tend to reject a tester which is more advanced than the the Woodhead-type tester based on UL's fraudulent requirements which indicate that the level of performance of the Woodhead-type tester is all that is required for safety (as alleged in paragraph 21 herein); as a further consequence, the development of technically and functionally superior testers has been and will continue to be impeded.

Special Injury To Plaintiff

Plaintiff has been directly harmed by this restraint of competition in the outlet circuit tester market. In

particular: plaintiff's competitors, the manufacturers of UL Listed Woodhead-type circuit testers, have been and will continue to be given an unfair competitive advantage over plaintiff's more superior and technically advanced but more expensive testers. Potential purchasers have rejected and will continue to reject plaintiff's testers based upon UL's fraudulent requirements which indicate that the level of performance of the less expensive Woodhead-type tester is all that is required for determining power system safety. The development of plaintiff's superior testers will continue to be impeded by this conspiracy; as a result, plaintiff will be deprived of the unfettered opportunity to offer its product in the market and to obtain the benefits of lower costs resulting from the economies of mass production (A-87, ¶ 58(q)).

As long as UL continues to list the Woodhead-type circuit testers in the fraudulent and wrongful manner as described herein, any UL Listing that plaintiff could obtain would be of no benefit, since it still would be forced to compete with the wrongfully UL Listed Woodhead-type circuit testers (A-90, ¶ 58(t)).

C. The District Court's Ruling

On or about October 6, 1982, UL moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss plaintiff's complaint as amended or in the alternative, pursuant to Rule 56, to grant summary judgment in favor of UL. UL suggested three arguments in support of its motion:

1. The complaint failed to allege a restraint of trade which constituted a violation of the Sherman Act;

2. Plaintiff had no standing as its injuries were not caused by a restraint of trade but were self-inflicted as plaintiff had never requested that UL List its products; and

3. The evidence of record established that UL's actions were all unilateral and thus UL had not been a party to any contract, combination or conspiracy.

In support of its alternate claim for summary judgment UL submitted various exhibits, deposition testimony and other evidence.

Plaintiff responded on November 12, 1982, and filed various affidavits, exhibits, deposition testimony

and other evidence in opposition to UL's alternate claim for summary judgment.*

On July 29, 1983, Judge Grady in a three page memorandum order granted UL's motion (A-11). While stating that he would treat the motion as one for summary judgment because of the documents and affidavits attached, Judge Grady in his opinion (which had two distinct parts) ruled in the first part solely on the basis of plaintiff's complaint as alleged (i.e., "plaintiff has not stated an antitrust claim against defendant UL") and only in the second part considered the attached affidavits and materials.

In the first part of his ruling, Judge Grady stated that the substance of plaintiff's argument as alleged in its complaint was that plaintiff "produced a superior

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* Plaintiff also requested that the District court strike as untimely that portion of UL's motion which requested summary judgment on the grounds that the evidence established that UL had not participated in any conspiracy. In the alternative, plaintiff requested in opportunity to pursue discovery on that issue (Plaintiff's Motion To Strike, dated October 20, 1982). The court denied plaintiff's motions (Order, dated October 20, 1982).

product and that only its product should qualify for UL Listing. Plaintiff's alleged injury results from the claim that it was forced to compete with inferior products." Judge Grady then concluded, "The antitrust laws were not created to police the quality of products placed into the stream of competition, nor to ensure that one would only have to compete with products of the same quality. The market itself will determine whether products are too inferior to satisfy the public's needs." Therefore, embracing this portion of his ruling in a single paragraph, Judge Grady ruled "that plaintiff has not stated an antitrust claim against defendant UL."

In the second portion of his ruling, although plaintiff had not claimed damages because it was wrongfully refused a UL Listing, Judge Grady, citing the affidavit of C.R. Bartholf, ruled that "plaintiff has failed to establish an antitrust violation or injury based upon its inability to obtain a UL listing." Because plaintiff admitted that it never submitted a product for testing by UL, he ruled as a matter of law that since UL, according to the Bartholf affidavit, would have been willing to consider whether or not it should give

plaintiff's product a UL Listing, "plaintiff is not in a position to establish that it would have been denied a UL listing."

THE COURT OF APPEALS RULING

As did the District Court, the Court of Appeals dismissed this action on the pleadings without reference to any of the evidence filed by the parties.

In spite of plaintiff's clear allegations describing the unreasonable restraint of competition in the circuit tester market caused by UL's fraudulent standard and listings, the Court of Appeals held that, as a matter of law, such a restraint did not violate the Sherman Act. The court concluded (A-9):

> We can accept ECOS's claim that a UL listing makes a Woodhead tester more attractive to consumers without accepting the claim that the listing unreasonably restrains competition. The purpose of UL is to affect competition by providing consumers with information concerning the safety of various products. Eliminating market imperfection by providing information to consumers, however, is not an illegal restraint of competition. That ECOS does not agree with UL's assessment of Woodhead testers is irrelevant. ECOS, as we have noted, may make its beliefs known through advertising, but ECOS may not forbid UL from making its belief in the safety of Woodhead testers equally known to consumers.

While the court recognized the similarity between plaintiff's claims and those presented to the Court in Radiant Burners v. Peoples Gas, Light and Coke Company, 364 U.S. 656 (1961), and American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982), it held that those cases were inapplicable because the mechanism used to restrain trade in those cases differed from the mechanism in the instant case (A-7):

> In both cases the Court recognized that the power of a standard-making organization can be abused when it is used to exclude competitors from a market by denying them the needed stamp of approval. ECOS, however, did not request a UL listing and now disclaims any interest in obtaining UL's stamp of approval. In essence the caliginous claim of ECOS emerges as a desire that its competitors not be listed by UL.

Plaintiff respectfully submits that UL's conspiratorial conduct herein cannot be dismissed as merely an attempt by UL to express its opinion on the merits of plaintiff's tester. Rather, UL engaged in a conscious conspiracy to improperly embed the Woodhead-type testers in the market and unreasonably limit competition as to the quality of these testers.

REASONS FOR GRANTING THE WRIT

While the Court has previously ruled that the use of standards to exclude competing products from a market by denial of a needed stamp of approval (Radiant Burners v. Peoples Gas Light and Coke Company, 364 U.S. 656 (1969)) or by misrepresentation that a product does not comply with a standard (American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982)) violates the Sherman Antitrust Act, the Court has not, to plaintiff's knowledge, ruled upon the issue presented by this case: does a standards making organization violate the Sherman Act when it uses its standards to embed inferior and inadequate products into the marketplace, therby restraining competition as to the quality of products in the market?

Thus, this petition presents a case of first impression* in a field of ever expanding importance, as this Court recognized a bare two years ago in Hydrolevel. In explaining the extraordinary impact standards have upon a market, this Court noted (456 U.S. at 559 and 571):

> These codes, while only advisory, have a powerful influence * * *. Obviously, if a manufacturer's product cannot satisfy the applicable ASME code, it is at a great disadvantage in the marketplace.
>
> * * *
>
> Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulatied by ASME's codes. Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an

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* The panel recognized the uniqueness of plaintiff's claim: "ECOS is the first to make the claim that approval of a competitor's products by such an organization, without more, constitutes an illegal restraint of trade." While plaintiff respectfully submits that it has claimed much more than a bare approval of a competitor's products, plaintiff agrees that its claim is one of first impression.

> opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employer's competitors through manipulation of ASME's codes.

In resolving this case of first impression by affirming dismissal of plaintiff's claims on the pleadings, the Court of Appeals ignored plaintiff's allegations of illicit use of standards and improperly contradicted two lines of established precedent which require recognition that standards may be used as part of a conspiracy to embed products of inferior quality into the marketplace, thereby stifling competition among manufacturers to market the highest quality of products.

First, by concluding that standards are mere expressions of opinion which do not restrain competition but rather eliminate market imperfections (A-9), the panel severely limited the Court's opinions in Hydrolevel and Radiant Burners, which clearly recognized that standards can be much more than opinions - they define the parameters of competition in many markets.

Second, by concluding that fraudulent quality-fixing standards do not run afoul of the Sherman Act as manufacturers remain free to compete as to price, the panel ignored a long line of cases which establish that the antitrust laws prohibit restraints on competition as to quality as well as restraints on competition as to price.

Finally, the panel's opinion contradicts the common sense conclusion that when manufacturers are allowed to manipulate the standards which define the market for their products, they can effectively insulate themselves from any meaningful competition. This sort of manipulation of markets is precisely the evil the Sherman Act was intended to prohibit.

I.
THE PANEL'S FINDING THAT STANDARDS, DESPITE THEIR USE IN A CONSPIRACY TO RESTRAIN COMPETITION, ARE AS A MATTER OF LAW, INNOCENT EXPRESSIONS OF OPINION CONFLICTS WITH THE DECISIONS OF THE COURT IN HYDROLEVEL AND RADIANT BURNERS

Plaintiff respectfully submits that the Court of Appeals ruling is clearly erroneous in that it gave no

weight to plaintiff's detailed and extensive allegations that described the impact of UL's Listings and Standards on the market (A-69, ¶20 and -21-(a)); the fraudulent misuse of Listings and Standards (A-74-86, ¶¶56-58 (o)); the reduced competition that resulted from that misuse (A-86, ¶58(p); and the injury suffered by plaintiff as a result of that reduced competition (A-87, ¶58(q).

Standards Are Much More Than Mere Expressions of Opinion

At least since 1961, the Court has recognized that standards, such as those plaintiff complains of in the instant action, can be improperly used to restrain competition.

In Radiant Burners v. Peoples Gas Light and Coke Company, 364 U.S. 656, 659 (1961), the Court, in holding that plaintiff's complaint alleged a conspiracy between plaintiff's competitors and suppliers of natural gas to use American Gas Association (AGA) standards to exclude it from the market, stated:

> The allegation in the complaint that "AGA and its Utility members, including Peoples and Northern, effectuate the plan and purpose of the unlawful combination and conspiracy . . . by . . . refusing to provide gas for use in the plaintiff's Radiant Burner[s]" because they "are

not approved by AGA" clearly shows "one type of trade restraint and public harm the Sherman Act forbids . . . ."

The Court again cautioned that standards had tremendous potential to restrain competition in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982). The defendant, ASME, a standards developer like UL, promulgated a standard for boiler shut-off valves. Plaintiff charged (and successfully proved) that Hydrolevel's competitors conspired with ASME, acting through one of its technical committee members, to issue a deceptive interpretation of ASME's standard, an interpretation which effectively eliminated Hydrolevel's product from the market in violation of Section 1 of the Sherman Act.

The Court affirmed the judgment against ASME, holding that ASME was liable for the acts of its committee members. The Court explicitly held that not-for-profit standards associations were not to be accorded immunity from the antitrust laws.

Plaintiff submits that its claim against UL is much stronger than that of Hydrolevel. That is, in Hydrolevel liability was imposed in spite of the fact that ASME did not directly participate in issuing the offending interpretation of its standard. In contrast, UL established its requirements for outlet circuit testers with full knowledge that they were deficient.

This view of the adverse impact inappropriate standards have on competition has also been adopted by the staff of the Federal Trade Commission in its report, Standards and Certification, Final Staff Report, pp. 58-59 (April, 1983). The FTC stated in part:

> Information about the price and quality of products promotes the efficient functioning of markets. However, when consumers rely on imperfect information, market failures may occur. When standards and certifications fail in their function as an information source by conveying inaccurate or incomplete information, they may cause the market to function inefficiently. The magnitude and seriousness of the market distortions caused by private standards and certification depend on the degree and extent of reliance on them as an information source and the nature of the information deficiency.
>
> Private standards and certifications may foster situations where purchasers are deceived about the quality of products. * * * Standards and seals that contain inaccurate or ambiguous

language or requirements may not only cause purchaser confusion, but may also create opportunities for producers to provide less quality than consumers are led to expect. (Footnote omitted).

The Panel Ignored The Significance Of Plaintiff's Charge That The Fraudulent UL Listing And Standard For Safety Restrained Competition In The Outlet Circuit Tester Market

The allegations of plaintiff's complaint clearly set forth the type of distortion in the outlet circuit tester market condemned in the above cases. Plaintiff alleged that compliance with UL Standards and Listings is a necessary prerequisite to competition in the circuit tester market (A-69, ¶21):

> UL's Standards and its Product Listing Service have two substantial effects in a market:
>
> (a) Any product which does not have a UL Listing or which cannot meet the specifications of a UL Standard risks market rejection as "unsafe".
>
> * * *
>
> (b) * * * Any product which exceeds the UL requirements and is thus more expensive than products which barely meet UL's requirements will also tend to be rejected as containing frivolous, unnecessary and unduly expensive features.

In other words, one cannot effectively market a tester which performs at a level below UL's requirements, regardless of price, nor can one effectively market a tester which is more costly than the least expensive tester which has been Listed by UL, regardless of quality.

Plaintiff also clearly alleged that UL, Woodhead and others had conspired and agreed to promulgate requirements for circuit testers which were known to be inadequate* (A-74, ¶56):

> [T]he defendants Woodhead, Reed, UL and thereafter other outlet circuit tester manufacturers and distributors, and the defendant ANSI further agreed, combined and conspired to imbed into the outlet circuit tester market technically inferior outlet circuit testers throught the use, among other mechanisms, of UL Listings on their outlet

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* As is set forth in the "Factual Statement" following the text of this petition, these allegations were fully supported in the evidence submitted to the District Court in opposition to UL's alternate motion for summary judgment. However, since the District Court and the Court of Appeals decided the case on the pleadings (A-5, n.1), this evidence is not directly relevant to the instant petition. The Factual Summary is appended merely for the Court's convenience.

> circuit testers, which Listings were knowingly based upon inadequate, arbitrary, capricious and deceptive criteria, sales documents and related materials.
>
> * * *

These general allegations were supplemented by an extremely detailed recital of the particular actions of defendants (A-76-86, ¶¶57-58(o)).

The panel rejected all of these detailed allegations of fact and instead chose to characterize the dispute between plaintiff and defendants as a mere difference of opinion (A-9):

> We can accept ECOS's claim that a UL listing makes a Woodhead tester more attractive to consumers without accepting the claim that the listing unreasonably restrains competition. The purpose of UL is to affect competition by providing consumers with information concerning the safety of various products. Eliminating market imperfection by providing information to consumers, however, is not an illegal restraint of competition. That ECOS does not agree with UL's assessment of Woodhead testers is irrelevant. ECOS, as we have noted, may make its beliefs known through advertising, but ECOS may not forbid UL from making its belief in the safety of Woodhead testers equally known to consumers.

Plaintiff respectfully suggests that this statement would have been equally applicable in Hydrolevel and

Radiant Burners. Presumably the defendants in each of these cases would argue that they were "providing consumers with information concerning the safety of various products," and that Hydrolevel and Radiant Burners could have made their "beliefs known through advertising." The Court rejected such defenses in Hydrolevel and Radiant Burners, and it should not allow the panel's opinion in the instant case to stand.

II.
RESTRAINT OF COMPETITION AS TO THE QUALITY OF PRODUCTS IN A MARKET HAS BEEN REPEATEDLY CONDEMNED

The panel's conclusion that standards are mere innocent expressions of opinion as to quality and thus do not run afoul of the Sherman Act is based on a flawed assumption that the antitrust laws condemn only one type of market restraint - price fixing - and do not reach restraints that are the very subject of standards - that is, restraints on competition as to the quality of goods. The panel's assumption contradicts clear Supreme Court precedent.

The Court has consistently held that restraints of competition as to the quality and performance level of a

product are the type of restraints that violate Section 1 of the Sherman Act.

In describing the policy underlying the Sherman Act, the Court stated in National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978):

> The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." Standard Oil Co. v. FTC, 340 U.S. 231, 248, 95 L.Ed. 239, 71 S.Ct. 240. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers (emphasis added).

This concern with the quality of products in the marketplace has been emphasized for many years. In Standard Oil Company of New Jersey v. United States, 221 U.S. 1 (1911), the Court described the evils inherent in anticompetitive conduct:

> The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby

> injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale."* (emphasis added)

In Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958), the Court emphasized that the Sherman Act is intended not only to eliminate restraints which affect the price of a product, but also restraints which adversely affect the quality of a product:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an

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* See also, United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 280 (6th Cir. 1898): Contracts in restraint of trade may be unreasonable if "They discourage industry and enterprise, and diminish the products of ingenuity and skill." More recently in State of Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982), the Court emphasized the invalidity of restraints which limit competition as to quality. "[Fixing maximum prices] may discourage entry into this market and may deter experimentation and new developments by individual entrepreneurs."

environment conducive to the preservation of our democratic political and social institutions.* (emphasis added)

This concern that competitors be allowed to compete freely as to the quality of the goods they offer as well as to their price is also reflected in the FTC's recent study of the effect of standards on competition (Standards and Certification, Final Staff Report, pp. 58-59 (April, 1983)):

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* Ironically, Northern Pacific Railway was the only decision cited by the District Court in its opinion dismissing plaintiff's complaint. Many Circuit and District Courts have similarly recognized the importance of competition as to quality. See for example, Quality Mercury, Inc. v. Ford Motor Company, 542 F.2d 466, 472 (8th Cir. 1976), "This allegation could be made more specific only by alleging in detail the specific probable effects of increased competition (e.g., reduced prices, improved service)" (emphasis added) and Fedderson Motors v. Ward, 180 F.2d 519, 521 (10th Cir. 1959), "The purpose of the Sherman Act was to prohibit "contracts for the restriction or suppression of competition in the markets, agreements to fix prices * * *, unity of purpose to furnish inferior products, and other like practices which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the markets (emphasis added.)

> Private standards and certifications may foster situations where purchasers are deceived about the quality of products. * * * Standards and seals that contain inaccurate or amiguous language or requirements may not only cause purchaser confusion, but may also create opportunities for producers to provide less quality than consumers are led to expect.

The Court of Appeals simply ignored these precedents and held that UL's conspiracy with Woodhead and other manufacturers of Woodhead-type testers to fraudulently list and promulgate a Standard covering these testers did not violate the antitrust laws as plaintiff remained free to compete with the Woodhead-type testers on the bais of price (A-8).

CONCLUSION

This Court recognized in Hydrolevel, (456 U.S. at, 572-3) that imposition of liability under the Sherman Act is an appropriate method for ensuring that organizations promulgate standards which foster rather than betray competition:

> Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for

> ASME to take those steps. Thus, a rule that impses liability on the standard-setting orgainization - which is best situated to prevent antitrust violations through the abuse of its reputation - is most faithful to the congressional intent that the private right of action deter antitrust violations.

The Court should reverse the panel's holding in this case to reaffirm the primary role of competition in the nation's economy.

As the Court noted, in another context, City of LaFayette, Louisiana v. Louisiana Power & Light Company, 435 U.S. 389, 408 (1978):

> If [standards organizations] were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

Plaintiff respectfully suggests that if the Court allows the panel's opinion to remain in force, standards organizations will increasingly be used as a screen behind which conspirators can insulate themselves from competition, thus rending a gaping hole in the "armor of antitrust protection."

Respectfully submitted,

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FACTUAL SUMMARY

While the District Court and the Court of Appeals dismissed plaintiff's claims on the pleadings, UL moved in the alternative for summary judgment and the parties submitted extensive evidence to the District Court. While this evidence is not directly relevant to the instant petition, it is summarized here for the Court's convenience.

There is overwhelming evidence of UL's participation in the subject conspiracy — that it repeatedly agreed with others to further the goals of the conspiracy.

In late 1964, Woodhead submitted its circuit tester model 1750 UL for certification and Listing. UL then subjected the Woodhead tester to a wide variety of tests, including tests for temperature, input and the reliability of circuit indication (that is, did the tester do what Woodhead stated it would do?).

UL concluded that the Woodhead tester did not comply with UL requirements for reliability. In particular, the tester failed two of UL's reliability tests

showing a "false indication".* As a consequence, on January 6, 1965, UL advised Woodhead that UL did "not consider the device eligible for Listing * * *" (A-94).

On July 14, 1972, Woodhead again submitted its 1750 circuit tester to UL for Listing. In the letter that accompanied Woodhead's submission, Woodhead stated (A-107):

> "The device is a modified version of our 1750 Circuit Tester which was not found suitable for UL Listing some time ago. We believe we have eliminated the condition which caused it to be unacceptable previously."

UL then proceeded to examine the Woodhead tester again. In its report of November 22, 1972 (def. ex. 5), UL described the tests to which it had subjected the Woodhead tester. Amazingly, none of these tests related to reliability of circuit indication, the tests which UL had performed on the Woodhead product and which the product failed in late 1964. Rather, UL

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* One false indication was a classic defect known as a "neutral-ground reversal": that is, a serious and hazardous wiring defect (Kleronomos affidavit, A-101, ¶4) whereby the tester indicates correct wiring when in fact the neutral and ground wires have been reversed.

performed a series of perfunctory tests relating to the ability of the tester to withstand heat, crushing blows, etc.

On November 22, 1972, despite its failure to examine the Woodhead tester for reliability of performance, UL's Chicago office (by L.J. Waldron, project engineer, and C.R. Bartholf, Engineering Group Leader) reported that the Woodhead tester "is found to comply with the present requirements covering the class and is judged to eligible for Listing and Follow-up of Underwriters Laboratories, Inc." (def. ex. 5).*

Just prior to the examination of the Woodhead tester by UL's Chicago office in late 1972, UL's Melville office had performed tests upon a circuit tester submitted to it for Listing by another company. UL-Melville had rejected that tester for a variety of defects which its tests disclosed (defects which the

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* Significantly, the reliability or "efficacy" test which UL's Chicago office did not perform were considered customary tests performed by UL at the time in question (Gloisten Dep., pp. 18-19 and 25)

record discloses constitute serious and hazardous wiring situations). When the UL-Melville office discovered that Chicago-UL had subsequently Listed a product with similar defects, the Melville office (by A.W. Smoot, Research Engineer, and Walter Skuggevig, Senior Project Engineer) wrote to Bartholf and Waldron expressing its concern and apparent dismay that Chicago had seen fit to list a similar tester (one which was not even as efficient as the one which Melville had rejected). UL-Melville then raised the critical question: "Should these testers be listed?" (A-109-112).

Following receipt of this letter, UL-Chicago for the first time tested the Woodhead Tester for reliability of indications. These tests reconfirmed the defects UL-Melville had noted, defects which had constituted the basis for UL's refusal to list that tester in 1964.

On April 30, 1973 UL set up a meeting which involved representatives of Daniel Woodhead, Harvey Hubbell, Inc., a manufacturer of a Woodhead type circuit tester which had been submitted for Listing, and other UL representatives. At that time, UL advised representatives of these manufacturers that it would

permit them to retain their UL Listing if they would agree to put certain finely written inserts into the packages of the circuit tester. The manufacturers agreed. In a letter to Woodhead, UL representatives concluded, "We would like to express our appreciation to you for your cooperation in this matter." As a consequence, the Woodhead-type circuit testers of Woodhead and Harvey Hubbell were permitted to retain their UL Listings, although the testers did not do what they purported to do (A-113-115).

In 1977, UL again discussed its requirements for outlet circuit testers with the manufacturers, this time in anticipation of formalizing its requirements for outlet circuit testers as a UL Standard for Safety: UL 1436. Again, all parties agreed not to upgrade UL's requirements (Gloisten Deposition, pp. 46 and 81).

Finally, assuming arguendo, that UL did not conspire with manufacturers of Woodhead-type circuit testers, there is no question that it conspired with co-defendant ANSI. In spite of UL's knowledge of the deficiency of UL 1436, UL requested that ANSI approve UL 1436. During the process of submitting UL 1436 to

ANSI, both UL and ANSI violated ANSI's procedures. In spite of the procedural irregularities, and in spite of ANSI's knowledge that UL 1436 was deficient, ANSI approved UL 1436 (A-85, ¶ 58(o)). This agreement by UL and ANSI to promulgate ANSI/UL 1436 is clearly a sufficient concert of action to violate §1 of the Sherman Act.

When this ten year history of wrongful conduct on the part of UL is viewed as a whole, it is clear that a jury would be justified in finding that UL had conspired with Woodhead, other outlet circuit tester manufacturers, and ANSI to embed inferior testers in the market.

Most significantly, UL did not contradict any of this evidence. Rather, UL submited a single abbreviated affidavit by Walter Skuggevig, a UL Research Associate in Mellville, Long Island. Mr. Skuggeng in substance states that while the previously UL Listed Woodhead-type circuit testers had inadequate performance capabilities, UL, in 1973, unilaterally decided that it would continue to List these products if the manufacturers agreed to supply additional

disclaimers with their products and that UL acted in good faith in reaching this decision.

Plaintiff submits that this type of affidavit in no way met UL's summary judgment burden and cannot overcome the specific evidence that UL knowingly listed inferior products with deceptive disclaimers pursuant to arbitrary and irrational standards.

On the contrary, if anything, the Skuggevig affidavit gives further support to plaintiff's position. Thus, according to that affidavit, UL's Chicago office had specific knowledge of the inadequate nature of the Woodhead-type circuit testers before UL gave its Listing to this type of product in late November, 1972; yet, UL granted the Listing anyway (A-109, ¶ 4 and A-110, ¶ 6).

UL's subsequent additional agreement with the manufacturers in late March, 1973 to cover up these inadequacies with additional deceptive disclaimers is further dramatic and damning evidence of UL's participation in the subject conspiracy.

Moreover, UL did not act unilaterally in this case: the marketing of the Woodhead-type tester, with its UL

certification, could continue only by mutual agreement of UL and the manufacturers. On April 30, 1973, UL by its own admission threatened to withdraw its Listing unless the manufacturers agreed to give users additional warnings about the limitation/deficiencies of the Woodhead-type testers. (UL has never challenged defendants' contentions that these additional warnings were deceptive and inadequate). Only when the manufacturers agreed to accept or obey or acquiesce in UL's directive could the manufacturers continue to market a UL-certified or Listed Woodhead-type circuit tester. In other words, UL and the Woodhead-type circuit manufacturers consciously reached agreement about the method whereby the UL Listed circuit testers would continue to be marketed. In reality, not only did UL not act unilaterally in this case, the agreement reached is of the most explicit and succinct type imaginable.